SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1228

ROBERT R. WILLIAMS, ANNA M. WILLIAMS, THE WIFE OF SAID ROBERT R. WILLIAMS, AND FORMERLY ANNA M. PERRY, JOHN W. DuBOSE, AND RALPH B. FERGUSON,

Petitioners,

vs.

KENNETH S. KEYES, ALEX M. BALFE, C. D. VAN ORSDEL, AND UNITED STATES FIDELITY AND GUARANTY COMPANY, A MARYLAND CORPORATION.

BRIEF SUPPORTING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Opinion Below.

The opinion of the court below filed January 30, 1942, is reported in 125 F. (2d) 208. This opinion is also shown in the Transcript of Record at Pages 76 to 78, inclusive. There was no opinion when the Petition for Rehearing was denied on March 10, 1942.

Statement of Grounds On Which Jurisdiction of Supreme Court Is Invoked.

Jurisdiction is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A. 347 (a).

This court is asked to review the decision of the Circuit Court of Appeals for the Fifth Circuit, on the ground that said Circuit Court has decided an important question of Federal law which has not been but should be settled by this Court.

The ground on which the jurisdiction of this court is invoked will be discussed more specifically hereinafter when the questions concerned shall have been set forth.

Statement of the Case.

On October 26, 1939, the respondents herein, Kenneth S. Keyes, Alex M. Balfe, and C. D. Van Orsdel, all citizens of the State of Florida, who shall hereinafter be referred to as "plaintiffs", filed suit in a Florida court in Miami, Florida, against United States Fidelity and Guaranty Company, a Maryland corporation, the remaining respondent herein, hereinafter referred to as "defendant", upon a Supersedeas Bond given in a chancery case in a Florida Court, in which said bond the plaintiffs were obligees, and the defendant as surety, and these petitioners, Robert R. Williams, John W. DuBose, Ralph B. Ferguson, and Anna M. Perry, as principals, were obligors (R. 7-13). The obligation upon the part of the obligors in said bond was a joint obligation, and not a several one, by the terms of said bond. The defendant removed its case to the United States District Court for the Southern District of Florida, Miami Division (R. 13-15), said defendant being the sole defendant in the State court. After the cause had been removed to the said District Court, these petitioners were brought

into said cause by said defendant as Third Party Defendants, because of their liability to the defendant in the event it was liable to the plaintiffs. (See Order—R. 47-48, and Third Party Complaint—R. 16-47). These petitioners moved the said District Court to remand the cause for lack of diversity of citizenship, and also moved said district court to dismiss the cause because of lack of substantive right of the plaintiffs to maintain the action (R. 51-53). Both of these motions were denied by the said District Court and subsequently judgment was entered for the plaintiffs against the defendant, and for the defendant against the Third Party Defendants (R. 58-61). This action of the District Court was affirmed by the United States Circuit Court of Appeals for the Fifth Circuit, its opinion and judgment having been made on January 30, 1942 (R. 78-82). Petition for Rehearing was filed on February 18, 1942, and denied without opinion on March 10, 1942 (R. 83-88). These petitioners contend that the said Circuit Court of Appeals erred in affirming the action of said District Court, in denying the motion of these petitioners to remand the suit to the State court for lack of Federal jurisdiction on the ground of diversity of citizenship, and also erred in affirming the action of said district court in not dismissing the said cause of action because of lack of substantive right to proceed upon the part of the plaintiffs.

These contended errors raised the following questions of law, to-wit:

1. In a suit upon a Five Thousand Dollar ($5,000.00) Supersedeas Bond, instituted in a Florida Court and removed to the proper U. S. District Court for said Florida Court on the ground of diversity of citizenship, wherein said plaintiffs were citizens of Florida and obligees in said bond, and the sole defendant was a Maryland corporation, and surety in said bond, by the terms of which the liability upon the part of said surety was joint with and not several

from that of the principals in said bond, who were citizens of Florida, were served, and were brought into said District Court as Third Party Defendants by said surety, does said District Court have jurisdiction on the ground of diversity of citizenship?

2. In a diversity of citizenship suit in the United States District Court of Florida, upon a Supersedeas Bond given in connection with an appeal taken in a Florida court, in which said suit the plaintiffs were obligees in said bond, and the sole defendant was one of the obligors in said bond, by the terms of which the liability upon the part of said sole defendant was joint with and not several from that of the other obligors in said bond who were omitted as defendants in said suit, were citizens of the same State as the plaintiffs, were personally served in said suit as Third Party Defendants, and properly plead in said suit their non-joinder as original defendants, should the court disregard the non-joinder of said Third Party Defendants as original defendants, hold that the original defendant had waived the right to plead such non-joinder, and enter a judgment for the plaintiffs against the sole defendant, or should the said suit be dismissed on its merits?

Simplifying the two questions of law stated above, they mean nothing more or less than the following:

Is there Federal jurisdiction on the ground of diversity of citizenship in a suit against one of several joint obligors where the omitted obligors are citizens of the same State as the plaintiffs and can be personally served, and if there is such Federal jurisdiction, should the suit be dismissed on its merits where the law of the state is to that effect because the plaintiffs have no substantive right to proceed against one of several joint obligors?

The Circuit Court of Appeals in determining that the said District Court had jurisdiction, said: "It (referring to

the surety company and sole defendant) made no defense on the ground of non-joinder of parties defendant, and thereby waived the point." This was in effect saying that the sole defendant could waive the right of the Third Party Defendants to plead that which the sole defendant had waived, although Rule 14 expressly gives to Third Party Defendants the right to plead any matter which the Third Party Plaintiff can plead. Were it not for this provision in Rule 14, said rule would be unconstitutional as violating the due process clause of the Constitution, in that it would bind Third Party Defendants with the judgment in the original case, and at the same time not give them the privilege of pleading thereto.

The effect of the opinion of said Circuit Court of Appeals also was to confer jurisdiction upon a district court over a suit upon which it had no jurisdiction prior to the passage of the Rules of Civil Procedure for district courts. This is contrary to the express provisions of Rule 82 of said rules.

The said Circuit Court of Appeals in its said opinion also stated: "They, (referring to these petitioners) could have interposed any defense they had." The effect of this reasoning is to make these petitioners parties defendant to the original suit for the purpose of pleading, but not parties defendant for the purpose of determining jurisdiction on diversity of citizenship. Rule 14, of the said Rules of Civil Procedure, does not give the privilege to Third Party Defendants to plead any defense, but only that defense which the Third Party Plaintiff might plead to the original claim.

The above questions presented are very important questions for the reason that they involve the whole Third Party procedure under the New Rules of Civil Procedure for District Courts, and involve the rights of Third Party Defendants, as well as the jurisdiction of the Court upon diversity of citizenship in such cases.

Prior to the passage of the new rules of procedure, one of several joint obligors could be sued, and if he failed to plead the non-joinder of the others, a judgment could be entered against him. This judgment, however, would not bind anyone not a party to the suit. The object of third party proceedings is to bind the Third Party Defendants by the original judgment. In order to do this, such Third Party Defendants must be allowed to plead any matter which the original defendant could plead; otherwise, there would be no due process of law. They cannot be allowed to plead their own defense, however, for this would be in effect allowing them to intervene in a suit in which the plaintiff had not seen fit to make them parties. Now the question comes, if the sole defendant jointly liable with others omitted as parties, waives the right to plead such non-joinder, can you bind the omitted parties under the new rules of procedure without allowing them to plead their own non-joinder in the original suit, even though their joinder might destroy the jurisdiction of the Court.

These questions have never been decided by the United States Supreme Court.

ARGUMENT.

Question No. 1.

In a suit upon a Five Thousand Dollar ($5,000.00) Supersedeas Bond, instituted in a Florida Court and removed to the proper U. S. District Court for said Florida Court on the ground of diversity of citizenship, wherein said plaintiffs were citizens of Florida and obligees in said bond, and the sole defendant was a Maryland corporation, and surety in said bond, by the terms of which the liability upon the part of said surety was joint with and not several from that of the principals in said bond, who were citizens of Florida, were served, and were brought into said District

Court as Third Party Defendants by said surety, does said District Court have jurisdiction on the ground of diversity of citizenship?

The above question assumes that the bond sued upon is a joint bond. The Circuit Court of Appeals in its opinion says: "The bond does not provide in specific terms whether the obligation of the principals and surety is joint, or joint and several. A reading of the bond leads to the conclusion that the liability of the obligors is joint and several, and this conclusion is borne out by the terms of the several indemnity agreements executed by the principals at the time of the execution of the bond."

This reasoning of said Circuit Court ignores the express words of the bond itself—"The undersigned Principals and Surety firmly bind themselves by these presents." It also ignores the almost universal rule that every contract is a joint contract unless words of severalty are placed therein. There is no statute in the State of Florida making any bond joint and several. We find the following quotation in 11 C. J. S. 426: "At law the presumption is that, where two or more persons enter into a bond without adding language disclosing a different intention, the undertaking is a joint and not a several one. This presumption, however, may be rebutted, and is rebutted, where the bond contains words of severance showing that it was the intention of the parties that it should be several, as well as joint; and under some statutes such obligations are presumed to be joint and several." The same is held at 9 C. J. 37.

The effect of the opinion of the Circuit Court of Appeals totally disregarded the law of the State of Florida as laid down in *Florida School-Book Depository, Inc.*, v. *Liddon*, (Fla.) 153 So. 902. In this case it was held that the meaning of a bond, not a statutory bond, must be determined from a consideration only of the language of the bond. The said bond was not ambiguous in its terms, and, therefore,

required no extrinsic evidence, either oral or written to construe the terms thereof. It was clearly a joint bond upon its face. The said Circuit Court of Appeals in rendering its opinion cited no authority therefor and overlooked entirely the authorities cited by these petitioners.

The said Circuit Court of Appeals by placing in its opinion words raising doubt as to whether or not the bond was a joint one, saying: "this conclusion is borne out by the terms of the several indemnity agreements executed by the principals at the time of the execution of the bond", overlooked and wholly failed to take into consideration the fact that neither the State Court which approved the Supersedeas bond sued upon, or the plaintiffs who sued upon said bond, were parties to said indemnity agreements. In other words, the Circuit Court attempts to construe the bond by agreements to which the obligees in said bond were not a party, and to which the State court which fixed the conditions and kind of bond to be filed, was not a party.

Of course if the bond is a joint and several bond there is no law suit, but neither the respondents nor anyone else has cited any law to this effect, the general law being that they are presumed to be joint unless words of severalty are placed therein.

In *Pickersgill* v. *Lahens*, 15 Wall. 140, 21 L. Ed. 119, an attempt was made by a bill in equity to convert a supersedeas bond on the face of which liability upon the part of the obligors was joint, into a bond wherein the liability upon the part of the obligors would be joint and several. The Court said that where the statute was silent as to whether or not a bond should be a joint, or joint and several bond, either would comply with the statute. The Court used the following words:

> "It is certainly not forbidden, and as the statute is silent on the subject the fair intendment is that either

was authorized, and that the Court had the right to direct which should be given."

In Florida there is no statute either in law or equity concerning any supersedeas bond to be filed in connection with any appeal in any Florida Court which either authorizes, directs, or mentions the bond in connection with the question as to whether or not the same should be joint or several, or both. Under the last cited case where a Court approves the supersedeas bond, as the plaintiffs allege in their declaration was done in the case at bar (Tr. 9, first paragraph) there can be no question either that the bond did not comply with Florida law or that there was any mistake of fact or law in the execution of the same.

Before going into the question of the jurisdiction of the Court, let us first look into the substantive rights of the parties. Under *Erie Railroad Company* v. *Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, 58 Sup. Ct. 817, the law of Florida controls as to such substantive rights. Section 4496, of the Compiled General Laws of Florida for 1927 (set out in full in the Appendix to this brief), in substance permits a plaintiff who has sued joint obligors to recover a judgment against the obligors served in the suit where the Sheriff returns that the defendant not served does not reside in the County, and where the judgment notes the fact of such non-service by the Sheriff.

In *Davis* v. *First National Bank & Trust Company in Orlando* (Fla.), 150 So. 633, a judgment was entered against some, but not all of the joint obligors on a note. The Court said:

"* * * since it is made by statute a condition precedent to the right of plaintiff to proceed to any judgment against less than all the defendants sued, strict compliance with the statute is essential to avoid a reversal of the judgment in direct appellate proceedings brought attacking it by writ of error."

The judgment was reversed in this case for not complying with the statute.

In *Nelson* v. *Ziegfeld* (Fla.), 131 So. 316, the plaintiff sued at law only one of two joint obligors, just as was done in the case at bar. The defendant in no manner objected to the non-joinder of the other party jointly liable with him. The lower court directed a verdict for the defendant at the trial of the cause, and the Upper Court affirmed this judgment of the lower court, saying:

> "The obligation being joint, the action to enforcee the obligation must be joint. Proof of a joint obligation will not support an action against one of the joint obligors, wherein the plaintiff alleges a several or single liability against such joint obligor."

So it is clear to be seen that the plaintiffs have no cause of action under the substantive law of Florida, in that their declaration shows upon its face an attempt to hold one of several joint obligors liable. Under the Florida law, one who sues upon a joint obligation must sue all of the joint obligors whether they can be served or not, and even the obligor who cannot be served is not dismissed from the suit. The plaintiff can recover a judgment against one of several joint obligors where all are parties defendant in the suit, and the sheriff makes the proper statutory return showing those obligors not in the judgment did not reside in the County. The Florida rule at all times requires the maintenance as parties defendant in the suit, all of the joint obligors, although judgment might be entered against only some where the conditions in the statute are complied with. This rule allows any obligor to voluntarily appear at any time even though he was not served. This rule clearly recognizes that the controversy is between the obligee on one side and all of the obligors on the other. In Florida, the plaintiff under no circumstances has the substantive right at any time to sue less than all of the joint obligors.

Now let us consider the jurisdiction of the U. S. District Court in this case after the same was removed thereto from the Florida Court.

Rule 82, of the New Rules of Civil Procedure for District Courts of the United States expressly provides: "These rules shall not be construed to extend or limit the jurisdiction of the District Courts of the United States or the venue of actions therein."

In the case of *United States* v. *Sherwood,* 85 L. Ed. 696, 61 Sup. Ct. 767, the Supreme Court of the United States said:

> "An authority conferred upon a Court to make rules of procedure for the exercise of its jurisdiction, is not an authority to enlarge that jurisdiction, and the Act of June 19, 1934, 48 Stat. 1064, 28 U. S. C. 723 b, authorizing this Court to prescribe rules of procedure in civil actions, gave it no authority to modify, abridge or enlarge the substantive rights of litigants or to enlarge or diminish the jurisdiction of Federal Courts."

28 U. S. C. 111 (Judicial Code 50) in substance provides that where a defendant is neither an inhabitant of, nor can be found within the district where the suit is brought, the Court may proceed without him, and his non-joinder cannot be plead in abatement. This Act was originally passed February 28, 1839. The law prior to February 28, 1839, is discussed in the famous case of *Shields* v. *Barrow,* 17 How. 130, 15 L. Ed. 158. This case is an authority throughout the Courts of America, both State and Federal, upon the question of parties. In this case the Bill of Complaint was dismissed because indispensable parties were omitted. Those omitted were citizens of the same state as the plaintiff, and were actually brought into the suit as defendants in a cross bill. The case is distinguished from the one at bar because it is a suit in equity, and the omitted parties were indispensable parties. In the case at bar, the omitted par-

ties were brought in as Third Party Defendants, whereas, in the *Shields* v. *Barrow* case, they were brought in as defendants to a cross bill. In both cases the omitted parties were citizens of the same State as the plaintiffs. In the *Shields* v. *Barrow* case, the Court defined three classes of parties: Formal, Necessary, and Indispensable. It in substance said that a formal party could or could not be made a party at the option of the plaintiff. A necessary party is one who must be made a defendant unless to do so would destroy the jurisdiction of the Court, or unless such party could not be served. The absence of a necessary party will not affect the decree in any manner. An indispensable party is one without whom no valid decree can be entered for the reason that the decree will affect the rights of the omitted party in some manner. The Court after explaining the difference between the various classes of parties, then stated as follows:

> "In *Cameron* v. *M'Roberts*, where the citizenship of the other defendants than Cameron did not appear on the record, this Court certified: 'if a joint interest vested in Cameron and the other defendants, the Court had no jurisdiction over the cause. * * *'"

In other words, the Court in effect said, that where there is a joint interest in the defendants, the Court is without jurisdiction unless there is a diversity of citizenship between the plaintiff and all of those having such a joint interest. The Court stated that this was the law when the Act of February 28, 1839 was passed. In speaking of this last Act, the Court said:

> "This Act relates solely to the non-joinder of persons who are not within the reach of the process of the Court. It does not affect any case where persons having an interest are not joined because their citizenship is such that their joinder would defeat the jurisdiction: and so far as it touches suits in equity we understand

> it to be no more than a legislative affirmance of the rule previously established by the cases of * * *."

Summing up the case of *Shields* v. *Barrow*, it simply means that the Act of February 28, 1839, had no effect whatsoever upon equity cases, and so far as equity cases are concerned, was no more than a legislative affirmance of the law as it existed prior to the Act. Such Act, however, did affect common law cases. Prior to the Act there was no authority whatsoever for omitting as a party defendant one of two, or more joint obligors. This Act allowed such omission where the omitted party was not within reach of process of the Court, but the case of *Shields* v. *Barrow* expressly says that this Act did not allow such omission because the citizenship of the omitted party was such as to defeat the jurisdiction of the Court.

The Court in the *Shields* case commenting upon an order of the lower court requiring the omitted parties to be brought in by cross bill, said:

> "It is apparent that if it were in the power of a Circuit Court of the United States to make and enforce orders like this, both the Article of the Constitution respecting judicial power, and the Act of Congress conferring jurisdiction on the Circuit Courts, would be practically disregarded in a most important particular."

In the case of *Clearwater* v. *Meredith*, 21 How. 489, 16 L. Ed. 201, a suit was brought upon a joint obligation against two of three joint obligors. The one omitted was alleged in the declaration not to be a citizen of the State where the suit was brought. It was held in this case that the suit could proceed to judgment, although one of the joint obligors was omitted by virtue of the Statute of February 28, 1839. The Court said:

> "It is well known that the Act of 1839 was intended so to modify the jurisdiction of the Circuit Court as to make it more practical and effective."

The Court furthermore said:

> "Now it is too clear for controversy that the Act of 1839 did intend to change the character of the parties to the suit."

The last two cited cases clearly show that prior to the Act of February 28, 1839, a Federal Court had no jurisdiction in a case against defendants upon a joint liability on the ground of diversity of citizenship, unless there was a diversity of citizenship between the plaintiff and all of the parties jointly liable to him whether they were in or out of Court, and the statute did not change this rule except in cases where persons were not within the reach of the process of the Court; but did enlarge the jurisdiction of the Court in such last mentioned cases. In the case at bar, appellants were within reach of the process of the Court, the statute, therefore, did not enlarge the jurisdiction of the Court, and it had no jurisdiction under the law effective prior to the statute.

Because of the *Shields* v. *Barrow* case, a great number of Federal Courts have adopted the rule that where an indispensable party is omitted as a defendant, and to bring such a party in would defeat the jurisdiction of the Court, then the Court has no Federal jurisdiction. Some of the more recent cases along this line are:

Crecelius, et al., v. *New Albany Machine Mfg. Co.*, 4 F. (2d) 369;
Martin v. *Barth*, 25 F. (2d) 95; and
Williams v. *Rickard*, 26 F. (2d) 244.

These cases adopting this rule, however, are erroneous. A court cannot enter a decree where an indispensable party

is omitted because the decree would affect the rights of a party not in court. In other words, the court does not have power to enter the decree, not because of lack of Federal jurisdiction, but because the decree itself would be void. No court, Federal or State, has any power to enter a void decree as would be the case if an indispensable party were omitted from the suit. The Supreme Court of the United States in the case of *Bogart* v. *Southern Pacific Co.*, 228 U. S. 137, 57 L. Ed. 768, 33 Sup. Ct. 497, clearly draws the distinction which I have tried to draw above. In this case, a Bill of Complaint was dismissed because an indispensable party was omitted. An appeal was taken direct to the Supreme Court of the United States under the old rule upon the ground that a question of Federal jurisdiction was involved. The Supreme Court said there was no question of Federal jurisdiction involved. The rule that a Court cannot enter a decree where an indispensable party is omitted, is a rule applicable to all courts and does not involve Federal jurisdiction. The bill was properly dismissed.

From the beginning, courts have held that a joint obligor is not an indispensable party in a common law suit upon the joint obligation. This has been held by the United States Supreme Court also.

Clearwater v. *Meredith*, 21 How. 489, 16 L. Ed. 201;
Camp v. *Gress*, 250 U. S. 308, 63 L. Ed. 997, 39 Sup. Ct. 478.

Where one of two joint obligors is sued, the court can enter a judgment unless the defendant objects thereto, inasmuch as the omitted obligor is not an indispensable party. But if the defendant in the suit objects to such omission, then the plaintiff has no substantive right to proceed without bringing in the omitted party, even though to do so would destroy the jurisdiction of the court.

In the case of *Camp* v. *Gress* (*supra*), the court quoting with approval from *Strawbridge* v. *Curtiss*, 3 Cranch. 267, 2 L. Ed. 435, said:

> "That where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those Courts (Courts of the United States)."

The Court in that case said:

> "First. The several defendants below although not citizens of the same State were all citizens of states other than that of the plaintiff. Hence, the diversity of citizenship requisite to Federal jurisdiction existed."

In this case of *Camp* v. *Gress*, there was a suit against a number of joint obligors, all of whom were served and brought into court. One of the defendants claimed the privilege of being sued in his own district. This was allowed and the case proceeded against the other obligors. It must be noted, however, that the court before passing on the question at all, first determined if there was diversity of citizenship between the parties as to the joint interest.

There seems to be no question but what at common law all joint obligors must be made parties defendant in common law suits. 1 C. J. 127; 1 C. J. 137; 9 C. J. 91; and 11 C. J. S. 476.

So we see that where an indispensable party is omitted, there is no question of Federal jurisdiction involved, even though the bringing in of such party would destroy the requisite diversity of citizenship. This is because where such a party is omitted, no court could enter a decree. In other words, a Federal Court determines whether or not it has power as a court to enter a decree, and then whether or not it has power as a Federal court to enter a decree. If it has no power as a court to enter a decree,

then it is not necessary to consider the question as to whether or not it has Federal jurisdiction. Since no court either Federal or State has power as a court to enter a judgment where an indispensable party is omitted, then it is not necessary for a Federal court in such a case to determine the question as to whether or not it has Federal jurisdiction, and, therefore, no question of Federal jurisdiction is involved as was held in *Bogart* v. *Southern Pacific Co.* (*supra*). In such a case, it would be useless to remand the case to the State Court from which it was removed because the State Court, as a Court, would have no power to enter a judgment, and so the case should be dismissed.

In a case, however, where one of two joint obligors is sued the Court as a Court does have power to enter judgment against the one obligor sued, because the omitted obligor is not an indispensable party, and, therefore, it is necessary in such a case that a Federal Court determine the question as to whether or not it has Federal jurisdiction. In such a case, the plaintiff has no substantive right to proceed against the one obligor in the absence of the other, not because the omitted obligor is an indispensable party, but because the contract sued upon does not give him such a right. In other words, the right of the plaintiff depends upon the inclusion of the omitted joint obligor as a defendant, and therefore, the controversy is between the plaintiff and both obligors. In such a case, it makes no difference whether the parties are parties to the suit or not. The controversy is between the joint obligors and the plaintiff, and there must be diversity of citizenship between all of them. It was for this very reason that in the case of *Camp* v. *Gress* (*supra*), the Court first determined that there was diversity of citizenship between all parties concerned before dismissing the cause as to one joint obligor under a Federal statute permitting the same.

Restating the above, no Court as a Court can enter a judgment where an indispensable party is not in the suit. Any Court can enter a judgment against one of two joint obligors in the absence of the other where the one against whom the judgment is entered does not properly object thereto, because the omitted obligor is not an indispensable party, provided it has jurisdiction of the subject matter. A Federal District Court only has jurisdiction of the subject matter in a suit against one of several joint obligors where there is diversity of citizenship between the plaintiff and all of the joint obligors, except in cases where Congress has by statute conferred jurisdiction otherwise, as was done under the Statute of February 28, 1839. In the case at bar, the statute of February 28, 1839, has no application whatsoever because the appellants were inhabitants of the district where the suit was brought, and could be and were actually found in said district. As a consequence, the law in the case at bar applicable, is that law which applied prior to the passage of said Act of February 28, 1839.

The judicial power granted in the Constitution of the United States extends to "controversies between citizens of different States", Article III, Section 2, Clause 1. The Federal Statute conferring jurisdiction upon United States District Courts, likewise confers jurisdiction over such controversies subject to limitations as to the amount involved. A plaintiff has no substantive right to sue one of two joint obligors over the objection of the one sued, and the one sued has a substantive right to insist upon the other jointly liable with him being joined in the suit. Therefore, both joint obligors as a matter of substantive law are parties to the controversy.

Before leaving this question of Federal jurisdiction, we would like to call the attention of the Court to the Removal Statute applicable where there are more than one defendant. 28 U. S. C. A. 71, (Judicial Code 28). The law is too

well settled under this section to require the citation of authorities that one defendant cannot remove the case unless he has a separable controversy. In the case at bar, had the plaintiffs complied with the Florida statute requiring all joint obligors to be made parties defendant in the suit, there could be no question but what the case could not be removed to the Federal Court because no one defendant would have a separable controversy. Such a case was the case of *L. & N. R. R. Co.* v. *Ide,* 114 U. S. 52, 29 L. Ed. 63, 5 Sup. Ct. 735. The Court there said:

> "Here it is certain joint contracts entered into by all the defendants for the transportation of property. On the one side of the controversy upon that cause of action is the plaintiff, and on the other all the defendants. The separate defenses of the defendants relate only to their respective interests in the one controversy. The controversy is the case, and the case is not divisible."

We would also like to call the attention of the Court to the Statute 28 U. S. C. A. 80, 5th Section of the Act of March 3, 1875 (18 Stat. 472), which requires that a suit be remanded to the Court from which it was removed in the event it appears to the District Court that the parties to said suit have been improperly or collusively made or joined either as plaintiffs or defendants for the purpose of creating a case removal to the Federal Court. In the case at bar, the plaintiffs illegally and improperly sued in a State Court of the State of which the plaintiffs were citizens, one of several joint obligors which was a corporation of another State. This joint obligor removed the case to the Federal Court, and after removing it, brought in as third-party defendants the remaining obligors jointly liable with the original defendant who were all citizens of the same state as the plaintiff. Certainly, such action upon the part of the plaintiffs in suing only one defendant, and upon the

part of the one defendant in removing the case and bringing in the third-party defendants, creates a prima facie case of collusion between the parties for the purpose of creating jurisdiction of the Federal District Court. To say the least, such action upon the part of the parties to the original suit requires some explanation.

The Circuit Court of Appeals in its opinion in this case held that the sole defendant, the Surety Company, by failing to plead the non-joinder of the Third-Party Defendants, the petitioners in this cause, waived its right to object thereto, and thereby jurisdiction was conferred upon the District Court. This might have been true had not the Third-Party Defendants been brought in. They were brought in in order that they would be bound by the judgment against the sole defendant in the original suit. In order to bind these Third-Party Defendants, however, they must have the right to plead any defense which the original defendant could plead. They plead their own non-joinder in the original suit as defendants, questioning both the jurisdiction of the Court as well as the substantive right of the plaintiffs to proceed against the sole defendant. The Circuit Court of Appeals completely ignored the pleadings of the Third-Party Defendants in this regard, thereby binding the Third-Party Defendants by the judgment in the original suit, and at the same time granting them no privilege of pleading in said suit. The practical effect of the decision of said Circuit Court is to allow the Third-Party Defendants to plead any defense they have to the bond, with the exception of the one defense which they did plead, to-wit, their own non-joinder as defendants in the original suit. It is the contention of these petitioners filing this brief, that if they as Third-Party Defendants are deprived of the right of filing any defense which the original defendant could have filed in the original suit, then they as Third-Party Defendants cannot be bound by the judgment in the original

suit without violating the due process clause of the Constitution of the United States.

Question No. 2.

In a diversity of citizenship suit in the United States District Court of Florida, upon a Supersedeas Bond given in connection with an appeal taken in a Florida court, in which said suit the plaintiffs were obligees in said bond, and the sole defendant was one of the obligors in said bond, by the terms of which the liability upon the part of said sole defendant was joint with and not several from that of the other obligors in said bond who were omitted as defendants in said suit, were citizens of the same State as the plaintiffs, were personally served in said suit as Third Party Defendants, and properly plead in said suit their non-joinder as original defendants, should the court disregard the non-joiner of said Third Party Defendants as original defendants, hold that the original defendant had waived the right to plead such non-joinder, and enter a judgment for the plaintiffs against the sole defendant, or should the said suit be dismissed on its merits?

This question assumes that the District Court did have jurisdiction as a Federal Court, but questions the substantive right of the plaintiffs to recover.

The first part of the argument under the first question, set forth in this brief hereinabove concerning the substantive rights of the parties, is applicable to this second question, and is again set forth under this second question in a more compact form for the convenience of the Court.

The liability of the obligors in the bond sued upon is joint (R. 11, for form of bond).

9 C. J. 37; 11 C. J. S. 426;

Florida School-Book Depository, Inc. v. *Lidden* (Fla.), 153 So. 902;

Fidelity & Deposit Company of Maryland v. *Aultman* (Fla.) 50 So. 991;

Pickersgill v. *Lahens,* 15 Wall. 140, 21 L. Ed. 119.

Under the law of Florida all joint obligors must be sued whether they can be served or not; they must at all times be parties defendant in the suit; and a judgment can only be entered against less than all of the joint obligors, provided, the judgment finds from the sheriff's return that those joint obligors omitted from the judgment were not residents of the county.

Section 4496, of the Compiled General Laws of Florida for 1927;

Davis v. *First National Bank & Trust Company in Orlando* (Fla.), 150 So. 633;

Nelson v. *Ziegfeld* (Fla.), 131 So. 316.

Under the law of the United States, one of several joint obligors can only be sued where the omitted obligors are not inhabitants of, or cannot be found within the district where the suit is brought.

28 U. S. C. A. 111 (Judicial Code 50);

Clearwater v. *Meredith,* 21 How. 489, 16 L. Ed. 201.

Under the common law rule the plaintiff could not recover except against all of the joint obligors, and all had to be sued.

1 C. J. 127; 1 C. J. S. 137;

9 C. J. 91; 11 C. J. S. 476.

Under Rule 19 (c) of the New Rules of Civil Procedure for Federal District Courts, a plaintiff in his pleading is required to state why he omits as a party any person who ought to be a party if complete relief is to be accorded. Such was not done in the case at bar.

In the case of *Gilman* v. *Rives,* 10 Peters 298, 9 L. Ed. 432, a declaration was filed against one of two joint judgment debtors both of whom were alive and within the juris-

diction of the Court. A demurrer was filed to the declaration and the same was sustained. The Supreme Court in this case said:

> "The sole question in the case is whether the action was maintainable against the defendant, Rives, alone; the judgment appearing on the face of the declaration to be a joint one against him and Lyne, and no reason being assigned in the declaration why Lyne was not made a party thereto. If it had appeared upon the face of the declaration that Lyne was dead, or out of the jurisdiction of the Court, or incapable of being made a party to the suit, there is no doubt that the action might well be maintained against the other judgment debtor.
>
> The question then is, whether the non-joinder of Lyne, as a Co-defendant, and the omission to aver any reason for such non-joinder, is a fatal defect, upon a general demurrer to a declaration thus framed. The matter might, without doubt, have been pleaded in abatement; and not having been so pleaded, it is contended that it cannot be taken advantage of upon general demurrer."

The Court further says in said case:

> "But if it should appear upon the face of the declaration, or other pleading of the plaintiff, that another jointly sealed the bond with the defendant, and that both are still living, the Court will arrest the judgment, and the objection may be taken by demurrer; because the plaintiff himself shows that another ought to be joined, and it would be absurd to compel the defendant to plead facts which are already admitted."

Further quoting from this case, we find

> "As a question, therefore, of authority, the doctrine seems well settled, and we cannot say that upon principle there is not good sense in requiring the plaintiff in his suit to assign some reason why, when he declares upon a joint judgment, he does not join others whom he states in his declaration to be jointly liable."

Conclusion.

Summarizing this entire brief, the District Court was without Federal jurisdiction over the suit, which was a controversy over or had as its subject matter a joint obligation, because there was no diversity of citizenship between the parties to such joint obligation, and, although there was diversity of citizenship between the parties to the suit—all of the parties to the joint obligation not being parties to the suit—yet this did not cure the lack of Federal jurisdiction, inasmuch as there was no Federal statute enlarging the jurisdiction of the District Court to include such a suit, where the omitted parties were inhabitants of and could be found within the district, as was the case in the suit, and, inasmuch, as the substantive right of the plaintiffs to recover depended upon the presence of such omitted parties in the suit; but even if the District Court had Federal jurisdiction over the suit, the plaintiffs had no substantive right to recover because their suit was based upon a several liability of a sole defendant, whereas, their substantive right to recover showed the liability of the defendant to be joint with and not several from that of parties who were not parties to the suit.

The Circuit Court of Appeals decided the above questions by holding them to have been waived, because the sole defendant in the original suit did not plead them, thereby in effect holding that a Third Party Plaintiff can waive the right of the Third Party Defendant to plead that which Rule 14, of the Rules of Civil Procedure for District Courts grants a Third Party Defendant the privilege of pleading. Such holding of said Circuit Court ignores the fact that the Third Party Defendants did actually plead that which had been waived by the Third Party Plaintiff. It also has the effect of binding the Third Party Defendants with the judgment in the original suit, and at the same time taking from

them their right to plead therein, which is not due process of law.

The writer of this brief entertains the hope that this Court will not think it a misnomer. If he has failed to be brief, it is not because of lack of diligence on his part in an effort to make it so, but rather because of his limited ability with the words at his command to achieve his desired result. He has attempted for the greater part to argue from postulates established by authority. He would think it presumptuous to consider himself a member of that school of intelligentsia which considers it intellectual indolence to take postulates upon authority without inquiring into their worth, and he has, therefore, avoided as much as possible any attempt to expound what he believes to be clearer or truer principles of law than those established by precedents.

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